



PATENT APPLICATION

PATENT AND TRADEMARK OFFICE

BEFORE THE HONORABLE BOARD OF PATENT APPEALS AND INTERFERENCES

In re the Application of

On Appeal from Group: 3732

Jean-Louis GUERET.

Application No.: 10/779,725

Examiner: R. RUNNING

Filed: February 18, 2004

Docket No.: 118556

For: A PACKAGING AND APPLICATOR DEVICE FOR A COSMETIC OR ANOTHER
CARE PRODUCT

APPEAL BRIEF TRANSMITTAL

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Attached hereto is our Brief on Appeal in the above-identified application.

Also attached hereto is our Check No. 205693 in the amount of Five Hundred Ten Dollars (\$510.00) in payment of the Brief fee under 37 C.F.R. 41.20((b)(2). In the event of any underpayment or overpayment, please debit or credit our Deposit Account No. 15-0461 as needed in order to effect proper filing of this Brief.

Respectfully submitted,

William P. Berridge
Registration No. 30,024

Stephen P. Catlin
Registration No. 36,101

WPB:SPC/eks

Date: May 15, 2008

OLIFF & BERRIDGE, PLC
P.O. Box 320850
Alexandria, Virginia 22320-4850
Telephone: (703) 836-6400

DEPOSIT ACCOUNT USE AUTHORIZATION Please grant any extension necessary for entry; Charge any fee due to our Deposit Account No. 15-0461
--



PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE HONORABLE BOARD OF PATENT APPEALS AND INTERFERENCES

In re the Application of

Jean-Louis GUERET

Application No.: 10/779,725

Examiner: R. RUNNING

Filed: February 18, 2004

Docket No.: 118556

For: A PACKAGING AND APPLICATOR DEVICE FOR A COSMETIC OR ANOTHER
CARE PRODUCT

BRIEF ON APPEAL

Appeal from Group 3732

OLIFF & BERRIDGE, PLC
P.O. Box 320850
Alexandria, Virginia 22320-4850
Telephone: (703) 836-6400
Attorneys for Appellants

05/16/2008 AWONDAF1 00000001 10779725

01 FC:1402

510.00 OP



TABLE OF CONTENTS

	<u>Page</u>
I. REAL PARTY IN INTEREST	1
II. RELATED APPEALS AND INTERFERENCES	2
III. STATUS OF CLAIMS	3
IV. STATUS OF AMENDMENTS	4
V. SUMMARY OF CLAIMED SUBJECT MATTER	5
A. Independent Claim 1	6
B. Independent Claim 34	7
C. Independent Claim 37	8
D. Independent Claim 42	8
E. Dependent Claims 7-9, 16, 19, 21, 22, 24 29, 31, and 32	9
VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL	11
VII. ARGUMENT	12
A. Case Law Summary	12
B. Claims 1, 3, 4, 6, 10-18, 20, 23, 25-27, 30, 34, 37-40 and 42 are Not Anticipated By Stange	12
C. Claims 1, 3, 4, 7-18, 20, 23, 25-27, 30-32, 34-40 and 42 Would Not Have Been Obvious From Vasas in view of Stange	15
D. Claims 7-9, 31, 32, and 35 Would Not Have Been Obvious From Stange in View of Shay	17
E. Claim 19 Would Not Have Been Obvious From Stange in view of Yamada	18
F. Claim 21 Would Not Have Been Obvious From Stange	18
G. Claim 22 Would Not Have Been Obvious From Stange in View of Riemann	19
H. Claim 24 Would Not Have Been Obvious From Stange in View of Kingsford	19
I. Claim 29 Would Not Have Been Obvious From Stange in View of Samaras	19

VIII. CONCLUSION	20
APPENDIX A - CLAIMS APPENDIX	A-1
APPENDIX B - EVIDENCE APPENDIX	B-1
APPENDIX C - RELATED PROCEEDINGS APPENDIX.....	C-1

I. REAL PARTY IN INTEREST

The real party in interest for this appeal and the present application is L'OREAL, by way of an Assignment recorded in the U.S. Patent and Trademark Office at Reel 014664, Frame 0748.

II. RELATED APPEALS AND INTERFERENCES

There are no prior or pending appeals, interferences or judicial proceedings, known to Appellant, Appellant's representative, or the Assignee, that may be related to, or that will directly affect or be directly affected by or have a bearing upon, the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1, 3, 4, 6-27, 29-32, 34-40, and 42 are on appeal.

Claims 1, 3, 4, 6-32, 34-40, and 42 are pending.

No claims are allowed.

Claims 1, 3, 4, 6-27, 29-32, 34-40, and 42 are rejected.

Claim 28 is withdrawn from consideration.

Claims 2, 5, 33 and 41 are canceled.

IV. STATUS OF AMENDMENTS

No Amendment After Final Rejection has been filed.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention is directed generally to applicators (3) and applicator methods for applying a substance (P), such as a cosmetic or other care product (FIGS. 1-4, generally, and ¶¶[0064] - [0075]). The applicator has a base portion (10) and a handle portion (20). The handle portion may be capable of being fixed to a receptacle (2). The applicator is positionable into multiple predefined application positions, which secure the handle portion relative to the base portion in at least two predefined application positions (FIGS. 15-16, and 17-18, and ¶¶[0098] - [0100]). This allows cosmetic or other substance to be applied with varying techniques, angles of attack, or to enable specific configurations for applying makeup to the left or right eye using the same hand movements (¶[0009] and ¶[0010]). For example, a user may apply lip gloss using the two positions shown below in Figs. 18-19, or apply mascara using the two positions shown below in Figs. 15-16.

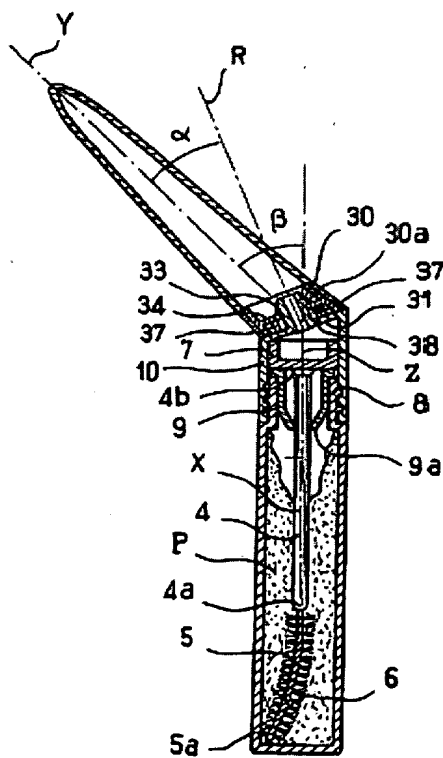


FIG. 4

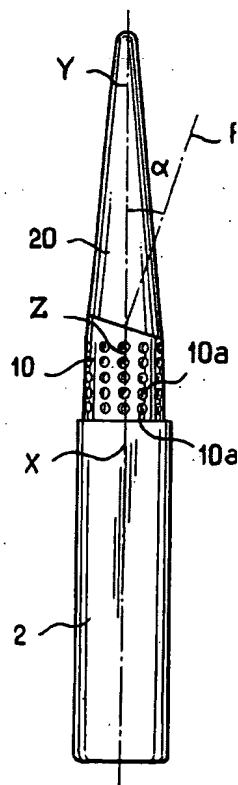
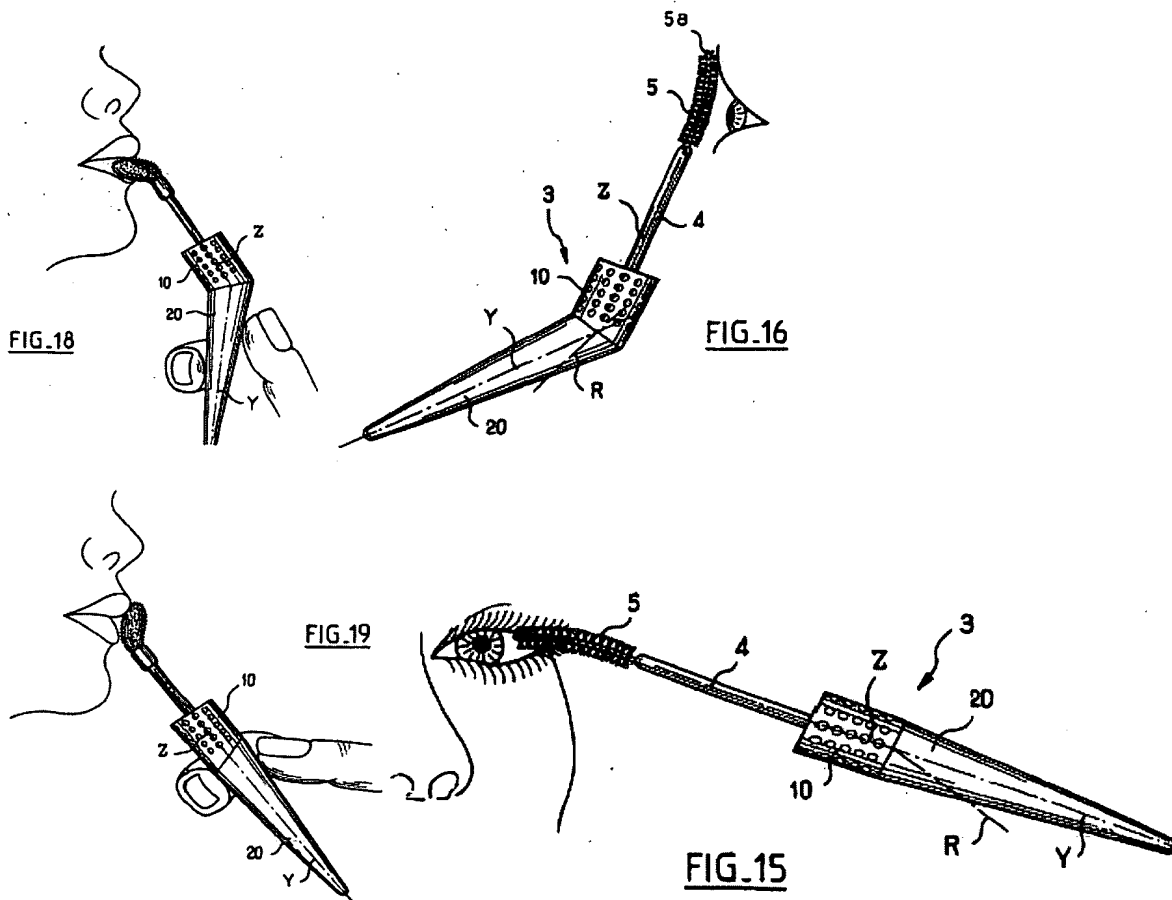


FIG. 2



A. Independent Claim 1

The invention of claim 1 is directed to an applicator (3) that includes: a base portion (10) carrying an applicator element (5) and "configured for" fixing onto a receptacle (2); and a handle portion (20) rotatably mounted on the base portion (10) to turn about a fixed axis of rotation (R), the handle portion (20) having a longitudinal axis (axis Y). (Figs. 1-4, ¶¶[0065] - [0067]).

The axis of rotation (R) and the longitudinal axis (axis Y) of the handle portion (20) are never mutually perpendicular (¶¶[0098] - [0100]). The axis of rotation (R) and the longitudinal axis (axis Y) are not parallel (¶¶[0098] - [0100]) (Figs. 15-19).

The base portion (10) and the handle portion (20) cooperate in such a manner as to enable a user to secure the handle portion (20) in at least two predefined application positions relative to the base portion (10) (Figs. 15-19 and ¶¶[0098] - [0100]).

In the application, the base portion (10) is taught to be "configured for" fixing onto the receptacle (2) using various structures described in ¶[0012] and ¶[0072] through ¶[0074], such as by a fixing means. The fixing means includes, for example, an inside thread (Fig. 4) allowing the base portion (10) to be screwed onto a neck (5) of the receptacle. Other fixing means may be used. For example, as described in ¶[0074] the base portion may be fixed onto the receptacle by friction or snap-fastening, such as by a groove configured to cooperate with a corresponding bead of the neck (8) of the receptacle (2). The fixing means may be leaktight or leakproof.

B. Independent Claim 34

The invention of claim 34 is directed to an applicator (3), comprising: a base portion (10) having an axis (axis Z) and carrying an applicator element (5)(Fig. 4). The base portion (10) is "configured for" fixing onto a receptacle (2); and a handle portion (20) is rotatably mounted on the base portion (10) to turn about a fixed axis of rotation (R), the handle portion (20) having a longitudinal axis (axis Y)(Fig. 4 and ¶¶[0064] - [0067]). The fixing onto the receptacle may be achieved by the fixing means described above in reference to independent claim 1.

An angle (β) between the axis (axis Z) of the base portion and the axis (axis Y) of the handle portion (20) is always strictly inferior to 90° when the handle portion is rotated about the axis of rotation (R) (¶[0067] and Fig. 4). The axis of rotation (R) and the longitudinal axis (axis Y) are not parallel (¶[0066] and Fig. 4)). The base portion (10) and the handle portion (20) cooperate in such a manner as to enable a user to secure the handle portion in at

least two predefined application positions relative to the base portion (Figs. 15-19 and ¶¶[0098] - [0100]).

C. Independent Claim 37

The invention of claim 37 is directed to a method of applying a substance on a portion of one of the face and the body. The method comprises: loading an applicator element (5) with substance (P), the applicator element (5) being secured to a base portion (10) that is turnable relative to a handle portion (20) about an axis of rotation (R) which is never perpendicular to the longitudinal axis (axis Y) of the handle portion (10) and wherein the axis of rotation (R) and the longitudinal axis (axis Y) are not parallel (Fig. 4 and ¶¶[0065] - [0067] and [0097] - [0100]); and between two different application modes, modifying a direction of the base portion (10) relative to the handle portion (20) (Figs. 15-19 and ¶¶[0098] - [0100]).

D. Independent Claim 42

The invention of claim 42 is directed to an applicator (3), comprising: a base portion (10) carrying an applicator element (5) and "configured for" fixing onto a receptacle (2); and a handle portion (20) rotatably mounted on the base portion (10) to turn about a fixed axis of rotation (R), the handle portion (20) having a longitudinal axis (axis Y) (Figs. 1-4 and ¶¶[0067]).

The axis of rotation (R) and the longitudinal axis (axis Y) of the handle portion (20) are not mutually perpendicular and not parallel (Fig. 4 and ¶¶[0066] - [0067]).

The applicator element (5) is configured for applying a product on at least one of lips, eyelids, eyelashes, and eyebrows (Figs. 15-19 and ¶[0100]).

The base portion (10) and the handle portion (20) cooperate in such a manner as to enable a user to secure the handle portion (20) in at least two predefined application positions relative to the base portion (10) (Figs. 15-19 and ¶¶[0098] - [0100]).

E. Dependent Claims 7-9, 16, 19, 21, 22, 24 29, 31, and 32

Dependent claim 7 adds that the base portion (10) comprises a closure cap for a receptacle (2) (Fig. 4 and ¶[0012]).

Dependent claim 8 adds that the base portion is arranged to be fixed onto a neck (8) of the receptacle (2) (Fig. 4 and ¶¶[0072] - [0074]).

Dependent claim 9 adds that the base portion (10) is configured to be fixed on the receptacle (2) by at least one of snap-fastening and friction (Fig. 4 and ¶¶[0072] - [0074]).

Dependent claim 16 adds that at least one of the base portion (10) and the handle portion (20) includes a pin (30) which is engaged in a housing of the other one of the base portion and the handle portion (Figs. 4, 5, and 9, for example, and ¶¶[0080], [0083], [0087], [0089], [0091]).

Dependent claim 19 adds that the pin (30) is split (Figs. 5-6 and ¶¶[0083] and [0087]).

Dependent claim 21 adds that pin (30) is arranged to be snap-fastened in a corresponding opening of the base portion (10) (Fig. 5, ¶[0083] and ¶[0087]).

Dependent claim 22 adds that the handle portion (20) includes fins (45) and a body (46) to which the fins are connected. The body (46) includes a housing (47) in which there is engaged a pin (30) that is secured to the base portion (10) (Figs. 7-9 and ¶¶[0087] - [0089]).

Dependent claim 24 adds that at least one of the base portion (10) and the handle portion (20) includes at least one marker (56) and the other includes an index (55) so as to enable a user to identify an annular position of the handle portion relative to the base portion (Fig. 12 and ¶[0094]).

Dependent claim 29 adds that the applicator element (5) is connected in a removable manner to the base portion (10) (Fig. 4, original claim 29 and ¶¶[0068] - [0070]).

Dependent claim 31 adds that the base portion (10) includes fixing means for fixing onto a receptacle (2) (Fig. 4 and ¶¶[0072] - [0074]). The fixing means includes, for example,

an inside thread (Fig. 4) allowing the base portion (10) to be screwed onto a neck (5) of the receptacle. Other fixing means may be used. For example, as described in ¶[0074] the base portion may be fixed onto the receptacle by friction or snap-fastening, such as by a groove configured to cooperate with a corresponding bead of the neck (8) of the receptacle (2). The fixing means may be leaktight or leakproof (¶[0075]).

Dependent claim 32 adds that the fixing means are leaktight (¶[0075]).

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are presented for review:

- 1) Claims 1, 3, 4, 6, 10-18, 20, 23, 25-27, 30, 34, 37-40 and 42 are rejected as anticipated under 35 U.S.C. §102(b) by Stange (German Patent Publication No. DE29614364);
- 2) Claims 1, 3, 4, 7-18, 20, 23, 25-27, 30-32, 34-40 and 42 are rejected as having been obvious under 35 U.S.C. §103(a) over Vasas (U.S. Patent No. 6,237,609) in view of Stange;
- 3) Claims 7-9, 31, 32, and 35 are rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Shay (U.S. Patent No. 397,028);
- 4) Claim 19 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Yamada (U.S. Patent No. 5,815,875);
- 5) Claim 21 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange;
- 6) Claim 22 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Riemann (U.S. Patent No. 4,922,575);
- 7) Claim 24 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Kingsford (U.S. Patent No. 5,137,038); and
- 8) Claim 29 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Samaras (U.S. Patent No. 3,664,856).

VII. ARGUMENT

A. Case Law Summary

In order to establish a *prima facie* case of anticipation, the Patent Office must establish that each and every element of a claim is found, either expressly or inherently, in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 2 USPQ2d 1051 (Fed. Cir. 1987). Moreover, "to serve as an anticipation when the reference is silent about the asserted inherent characteristic...evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by a person of ordinary skill" (emphasis added). *Continental Can Co. USA v. Monsanto Co.*, 948 F.2d 1264, 1268, 20 USPQ2d 1746, 1749 (Fed. Cir. 1991).

Additionally, when evaluating claims for obviousness (as well as anticipation), all of the limitations of the claims must be considered and given weight. MPEP §2143.03. *Ex parte Grasselli*, 23 USPQ 393 (Bd. App. 1983) *aff'd* mem. 738 F.2d 453 (Fed. Cir. 1984).

The mere fact that references can be combined or modified does not render the resultant combination obvious unless there would have been a reason to make the combination or modification and the results thereof would have been predictable to one of ordinary skill in the art. *KSR International Co. v. Teleflex Inc.*, 550 U.S. _____, 82 USPQ 2d 1385, 1396 (2007).

B. Claims 1, 3, 4, 6, 10-18, 20, 23, 25-27, 30, 34, 37-40 and 42 are Not Anticipated By Stange

Claims 1, 3, 4, 6, 10-18, 20, 23, 25-27, 30, 34, 37-40 and 42 are rejected as anticipated under 35 U.S.C. §102(b) by Stange (German Patent Publication No. DE29614364). This rejection is respectfully traversed.

With respect to independent claims 1, 34 and 42, the Examiner improperly ignores the recited "configured for fixing onto a receptacle" language, which is a positive recitation of structure that must be given patentable weight. When evaluating claims for obviousness (as

well as anticipation), all of the limitations of the claims must be considered and given weight. MPEP §2143.03. *Ex parte* Grasselli, 23 USPQ 393 (Bd. App. 1983) *aff'd* mem. 738 F.2d 453 (Fed. Cir. 1984).

The recited "configured for" differs from intended use in that it is a positive recitation of structure that facilitates the resultant fixing. For example, Applicant's Fig. 4 and ¶ [0012] show a screw thread as a suitable corresponding structure by which the base portion is configured for fixing onto the receptacle. Dependent claim 9 defines more specific structure, as well as dependent claim 35, which adds the receptacle removably mountable to the base. Claim 31 specifically recites fixing means, activating §112, paragraph 6. In compliance with 37 CFR §41.37(c)(v), Applicant discusses all disclosed structure for achieving the recited function in Section V. above. Thus, claims 1, 34 and 42 positively recite a structure that achieves such fixing.

Despite this recited structure, the Final Rejection alleges that this is merely "intended use" and that Stange "could" be fixed to a receptacle, such as by being "set in a receptacle such as a cup."

First, as mentioned above, "configured for" is positive structure that must be given patentable weight and should be construed in light of Applicant's specification. Second, the allegation that Stange "could" be fixed to a receptacle is factually flawed because Stange is directed to a standalone brush with a base used for standing on a table. It is not intended to be fixed and cannot be "fixed" to a receptacle without some additional, undisclosed structure. In addition, the alleged setting in a cup hypothetical would not fix the base to a receptacle. To serve as anticipatory, the reference must necessarily contain the alleged characteristic. Because a reference must teach each and every feature in order to be anticipatory and Stange fails to do so, a *prima facie* case of anticipation has not been made.

Moreover, independent claims 1, 34 and 42 recite, *inter alia*, that "the base portion and the handle portion cooperate in such a manner as to enable a user to secure the handle portion in at least two predefined application positions relative to the base portion." For example, Applicant's specification teaches that the applicator can apply substance (such as make-up or mascara) to a user's eyelashes, eyebrows, etc. at two different inclinations (paragraph [0041]) allowing, for example, applying of make-up or mascara to the left eye or right eye using the same hand movements (paragraph [0010]). See, for example, Applicant's Figs. 16-19, which show multiple application positions.

Stange, however, provides a brush that applies product such as shaving cream in a single disclosed vertical position. Because of the nature of the vertical position and water being on the brush, Stange provides a different angled position that is solely a drying position. This allows the brush to dry without the water dripping on the handle. Thus, Stange fails to teach or suggest two application positions. As mentioned previously, patentable weight must be given to each and every claim limitation. *Ex parte Grasselli*.

Because a reference must teach each and every feature in order to be anticipatory and Stange fails to do so, a *prima facie* case of anticipation has not been made with respect to independent claims 1, 34, and 42.

Moreover, in making the rejection, the Office Action alleges that Stange provides multiple positions and that the reference is not limited to its preferred (i.e., only) embodiment, but for what it fairly teaches. However, the mere fact that references can be combined or modified from other uncited or disclosed teachings does not meet the anticipation standard, and does not even render the resultant combination obvious unless the prior art also suggests a rationale for the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). No such desirability is found in Stange because the sole purpose of the extra position is to

allow for drying. Thus, the Examiner's position may only be gleaned from impermissible hindsight consideration of Applicant's specification.

With respect to method claim 37, the Office Action fails to make a *prima facie* case of anticipation because it fails to identify a teaching of the method step of modifying a direction of the base between two different application modes. Instead, as discussed above, Stange provides a brush that is mobile relative to the handle so as to enable drying of the brush (without soap or water remaining trapped within the bristles). Thus, Stange teaches only a single application mode (i.e., conventional use in the vertical position for application of shaving cream), and a different angled position for the sole purpose of drying (which does not apply product to the user). This latter position is necessitated by the vertical positioning of the brush above the handle to achieve drying. This latter position is not taught to be useful for applying shaving cream and thus does not suggest using a second application mode.

Because a reference must teach each and every feature in order to be anticipatory and Stange fails to do so, a *prima facie* case of anticipation has not been made with respect to independent claim 37 because the specific method steps are not disclosed.

Therefore, because each and every feature of the independent claims is not found in Stange, Applicant respectfully submits that independent claims 1, 34, 37 and 42 and claims dependent therefrom are patentable over Stange. Accordingly, withdrawal of the rejection over Stange is respectfully requested.

C. Claims 1, 3, 4, 7-18, 20, 23, 25-27, 30-32, 34-40 and 42 Would Not Have Been Obvious From Vasas in view of Stange

Claims 1, 3, 4, 7-18, 20, 23, 25-27, 30-32, 34-40 and 42 are rejected as having been obvious under 35 U.S.C. §103(a) over Vasas (U.S. Patent No. 6,237,609) in view of Stange. This rejection is respectfully traversed.

Vasas discloses a typical mascara brush with a single fixed handle and application position and provides no teaching or reason to configure the stem or cap to render the stem or cap mobile in relation to the remainder of the device. Vasas also has no appreciation of advantages achieved from the availability of two different application modes for the brush.

As discussed above, Stange is not "configured for" fixing onto a receptacle and is instead a stand alone brush designed to be placed on a flat surface with the brush exposed for drying. Stange also is not concerned with advantages achieved by having two application modes which allow, for example, the brush to apply mascara to the left or right eye with the same hand movement (Applicant's paragraph [0010]) or to change the angle of attack for a different application effect (Applicant's paragraph [0009]). Instead, a shaving brush as in Stange just needs to generally apply shaving cream over a face in a non-exact manner. Thus, with respect to independent method claim 37, Stange like Vasas fails to teach two application modes.

One of ordinary skill in the art also would not have had reason to combine Stange and Vasas for the alleged purpose of allowing the "user to use multiple angles of tilt while applying a product" as alleged because both references teach only a single application position and each teaches the same position (i.e., with the brush extending parallel with the handle axis).

The Final Rejection alleges that motivation to combine comes from the "teaching of Stange to make a more ergonomical handle." However, there is no such teaching in Stange. Instead, Stange discloses a brush having a tuft of bristles that is mobile relative to the handle so as to enable drying of the device without water or soap remaining trapped within the bristles. Such a problem is not faced by Vasas as its brush extends downward into a receptacle. Moreover, like Vasas, only a single application mode is disclosed in Stange. Neither appreciates advantages of two different application modes to achieve different styling

effects or, for example, to apply mascara to the left or right eye with the same hand movement. Thus, the rotatable base of Stange would have no utility in Vasas as Stange teaches a single application position which, like Vasas, has the brush parallel with the handle axis. Thus, no reason or rationale for the alleged combination is found from the cited teachings.

Moreover, with respect to independent method claim 37, neither reference teaches use of two application modes. Therefore, there is no teaching or rationale for one to perform the recited method steps.

Accordingly, independent claims 1, 34, 37 and 42 and claims dependent therefrom patentably distinguish over Vasas and Stange. Withdrawal of the rejection is respectfully requested.

**D. Claims 7-9, 31, 32, and 35 Would Not Have Been Obvious
From Stange in View of Shay**

Claims 7-9, 31, 32, and 35 are rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Shay (U.S. Patent No. 397,028). This rejection is respectfully traversed.

As admitted, Stange fails to teach or provide a reason for providing the recited structure or means for "fixing" recited in the dependent claims. Stange also fails to teach or provide a reason for providing a receptacle with the application of claim 1 as recited in claim 35. Regarding means-plus-function claim 31, the corresponding disclosed structure in the application is discussed in Section V. above in compliance with 37 CFR §41.37(c)(v).

Shay fails to overcome the deficiencies of Stange with respect to independent claim 1. The Office Action alleges that it would have been obvious to place the shaving brush of Stange on the Shay receptacle. However, if combined as alleged, the brush would be stored upside down in the receptacle so there would be no need for the angled drying position.

Moreover, sealed storage would prevent drying of the wet shaving brush after usage. Thus, this would destroy the intended purpose and need for the angled drying position.

Alternatively, if attachment was by fixing of the handle of Stange onto the Shay receptacle so as leave the brush exposed to allow drying, the fixing would be provided on the handle, instead of by the base as claimed. Accordingly, there is no reason for the alleged combination or the combination does not result in the claimed combination of features.

Accordingly, claims 7-9, 31, 32, and 35 are allowable for their dependence on allowable base claim 1, as well as for the additional fixing or receptacle structural features recited in those claims. Withdrawal of the rejection is respectfully requested.

E. Claim 19 Would Not Have Been Obvious From Stange in view of Yamada

Claim 19 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Yamada (U.S. Patent No. 5,815,875). This rejection is respectfully traversed.

Yamada fails to overcome the deficiencies of Stange with respect to independent claim 1. Accordingly, claim 19 is allowable for its dependence on allowable base claim 1, as well as for the additional features recited in claim 19. Withdrawal of the rejection is respectfully requested.

F. Claim 21 Would Not Have Been Obvious From Stange

Claim 21 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange. This rejection is respectfully traversed.

Stange is discussed above and fails to teach, or provide any reason to provide, a base portion secured in at least two predefined application positions and "configured for" fixing onto a receptacle. Accordingly, claim 21 is allowable for its dependence on allowable base claim 1, as well as for the additional features recited in claim 21. Withdrawal of the rejection is respectfully requested.

G. Claim 22 Would Not Have Been Obvious From Stange in View of Riemann

Claim 22 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Riemann (U.S. Patent No. 4,922,575). This rejection is respectfully traversed.

Riemann fails to overcome the deficiencies of Stange with respect to independent claim 1. Accordingly, claim 22 is allowable for its dependence on allowable base claim 1 and for the additional features recited in claim 22. Withdrawal of the rejection is respectfully requested.

H. Claim 24 Would Not Have Been Obvious From Stange in View of Kingsford

Claim 24 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Kingsford (U.S. Patent No. 5,137,038). This rejection is respectfully traversed.

Kingsford fails to overcome the deficiencies of Stange with respect to independent claim 1. Accordingly, claim 24 is allowable for its dependence on allowable base claim 1, as well as for the additional features recited in claim 24. Withdrawal of the rejection is respectfully requested.

I. Claim 29 Would Not Have Been Obvious From Stange in View of Samaras

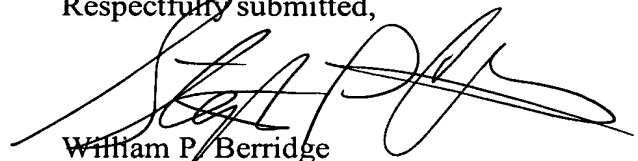
Claim 29 is rejected as having been obvious under 35 U.S.C. §103(a) over Stange in view of Samaras (U.S. Patent No. 3,664,856). This rejection is respectfully traversed.

Samaras fails to overcome the deficiencies of Stange with respect to independent claim 1. Accordingly, claim 29 is allowable for its dependence on allowable base claim 1, as well as for the additional features recited in claim 29. Withdrawal of the rejection is respectfully requested.

VIII. CONCLUSION

For all of the reasons discussed above, it is respectfully submitted that the rejections are in error and that claims 1, 3, 4, 6-32, 34-40, and 42 are in condition for allowance. For all of the above reasons, Appellants respectfully request this Honorable Board to reverse the rejections of claims 1, 3, 4, 6-32, 34-40, and 42.

Respectfully submitted,



William P. Berridge
Registration No. 30,024

Stephen P. Catlin
Registration No. 36,101

WPB:SPC/eks
OLIFF & BERRIDGE, PLC
P.O. Box 320850
Alexandria, Virginia 22320-4850
Telephone: (703) 836-6400

Filed: May 15, 2008

APPENDIX A - CLAIMS APPENDIX

CLAIMS INVOLVED IN THE APPEAL:

1. An applicator comprising:
a base portion carrying an applicator element and configured for fixing onto a receptacle; and
a handle portion rotatably mounted on the base portion to turn about a fixed axis of rotation, the handle portion having a longitudinal axis,
wherein the axis of rotation and the longitudinal axis of the handle portion are never mutually perpendicular, the axis of rotation and the longitudinal axis are not parallel, and wherein the base portion and the handle portion cooperate in such a manner as to enable a user to secure the handle portion in at least two predefined application positions relative to the base portion.
3. An applicator according to claim 1, wherein the axis of rotation and an axis of the base portion are not mutually perpendicular.
4. An applicator according to claim 1, wherein the base portion and the handle portion co-operate in such a manner as to enable a user to secure the handle portion in at least one predefined position relative to the base portion.
6. An applicator according to claim 1, wherein the handle portion and the base portion co-operate so as to produce a click sound when a predefined position of the handle portion relative to the base portion is reached.
7. An applicator according to claim 1, wherein the base portion comprises a closure cap for a receptacle.
8. An applicator according to claim 7, wherein the base portion is arranged to be fixed onto a neck of the receptacle.

9. An applicator according to claim 1, wherein the base portion is configured to be fixed on the receptacle by at least one of snap-fastening, screwing and friction.
10. An applicator according to claim 1, wherein the handle portion and the base portion are arranged in such a manner that a user may turn the base portion relative to the handle portion using only one hand.
11. An applicator according to claim 1, wherein at least one of the base portion and the handle portion has, on an outside thereof, at least one portion in relief.
12. An applicator according to claim 1, wherein at least one of the base portion and the handle portion is made at least in part out of a material that provides a good grip.
13. An applicator according to claim 1, wherein at least one of the base portion and the handle portion is made at least in part out of a non-slip material.
14. An applicator according to claim 1, wherein the base portion includes a surface that is inclined relative to the axis of the base portion, and against which the handle portion bears, the axis of rotation extending substantially orthogonally to the inclined surface.
15. An applicator according to claim 1, wherein at least one portion in relief is disposed on at least one facing surface of at least one of the base portion and the handle portion, the at least one portion in relief being configured to facilitate securing the handle portion in a predefined angular position relative to the base portion.
16. An applicator according to claim 1, wherein at least one of the base portion and the handle portion includes a pin which is engaged in a housing of the other one of the base portion and the handle portion.
17. An applicator according to claim 16, wherein the base portion includes a pin.
18. An applicator according to claim 17, wherein the pin is provided with a step at one end to be snap-fastened through a corresponding opening of the handle portion.
19. An applicator according to claim 16, wherein the pin is split.

20. An applicator according to claim 1, wherein the handle portion includes an insert that enables the handle portion to be fixed onto the base portion by snap-fastening.
21. An applicator according to claim 16, wherein the handle portion includes a pin arranged to be snap-fastened in a corresponding opening of the base portion.
22. An applicator according to claim 16, wherein the handle portion includes fins and a body to which the fins are connected, the body including a housing in which there is engaged a pin that is secured to the base portion.
23. An applicator according to claim 16, wherein the handle portion includes a cylindrical body provided at one end with a rim onto which a pin secured to the base portion is to be snap-fastened.
24. An applicator according to claim 1, wherein at least one of the base portion and the handle portion includes at least one marker, and the other one of the base portion and the handle portion includes an index so as to enable a user to identify an annular position of the handle portion relative to the base portion.
25. An applicator according to claim 1, including a stem having a first end and a second end, the stem carrying, at the first end, the applicator element, and being secured at the second end to the base portion.
26. An applicator according to claim 25, wherein the applicator element comprises a brush.
27. An applicator according to claim 26, wherein the brush includes a non-rectilinear core.
29. An applicator according to claim 1, wherein the applicator element is connected in a removable manner to the base portion.
30. An applicator according to claim 1, wherein the applicator element has a free end that is offset to one side relative to an axis of the applicator element, the free end being

situated on a same side as the handle portion when an angle between the axes of the base portion and the handle portion is at a maximum.

31. An applicator according to claim 1, wherein the base portion includes fixing means for fixing onto a receptacle.

32. An applicator according to claim 31, wherein said fixing means are leaktight.

34. An applicator comprising:
a base portion having an axis and carrying an applicator element, the base portion being configured for fixing onto a receptacle; and
a handle portion rotatably mounted on the base portion to turn about a fixed axis of rotation, the handle portion having a longitudinal axis;
wherein an angle between the axis of the base portion and the axis of the handle portion is always strictly inferior to 90° when the handle portion is rotated about the axis of rotation, the axis of rotation and the longitudinal axis are not parallel, and wherein the base portion and the handle portion cooperate in such a manner as to enable a user to secure the handle portion in at least two predefined application positions relative to the base portion.

35. A packaging and applicator device, comprising:
an applicator according to claim 1; and
a receptacle onto which the applicator is to be fixed in a removable manner.

36. A device according to claim 35, wherein the receptacle includes a wiper member arranged to wipe the applicator element while the applicator is being removed.

37. A method of applying a substance on a portion of one of the face and the body, the method comprising:

loading an applicator element with substance, the applicator element being secured to a base portion that is turnable relative to a handle portion about an axis of rotation

which is never perpendicular to the longitudinal axis of the handle portion and wherein the axis of rotation and the longitudinal axis are not parallel; and

between two different application modes, modifying a direction of the base portion relative to the handle portion.

38. The method of claim 37, wherein the substance comprises a care product.

39. The method of claim 38, wherein the substance comprises a cosmetic.

40. The method of claim 37, further comprising applying the substance on at least one of lips, eyelids, eyelashes, eyebrows and hair.

42. An applicator comprising:

a base portion carrying an applicator element and configured for fixing onto a receptacle; and

a handle portion rotatably mounted on the base portion to turn about a fixed axis of rotation, the handle portion having a longitudinal axis;

wherein the axis of rotation and the longitudinal axis of the handle portion are not mutually perpendicular and not parallel;

wherein the applicator element is configured for applying a product on at least one of lips, eyelids, eyelashes, and eyebrows, and

wherein the base portion and the handle portion cooperate in such a manner as to enable a user to secure the handle portion in at least two predefined application positions relative to the base portion.

APPENDIX B - EVIDENCE APPENDIX

NONE

APPENDIX C - RELATED PROCEEDINGS APPENDIX

NONE